TWO U.S. TENETS CONFLICT IN SUIT

Constitutional Issue Posed in Effort to Ban Hearings

BY FRED P. GRAHAM
Special to The New York Times

WASHINGTON, Aug. 16—Opponents of the House Un-American Activities Committee have confronted the Federal courts with a conflict between two fundamental tenets of American constitutional law—freedom of speech and the separation of powers.

Stripped of its legal trappings, the current suit to enjoin the committee from questioning Vietnam war critics is an attempt to persuade the Federal judiciary to abandon its tradition against intervention in Congressional affairs, in order to uphold the high standards of free speech recently announced by the Supreme Court.

Lawyers for the American Civil Liberties Union saw the opportunity for this legal maneuver in April, 1965, when the Supreme Court handed down a little-noticed decision involving two civil rights activitists in New Orleans.

The two were being threatened by Louisiana officials with criminal prosecutions under state antisubversive laws that were patently unconstitutional. Any conviction would almost certainly have been reversed, but the two men asked the courts to bar any prosecution in advance so they could advocate their ideas free of the threat of arrest.

High Court Ruling

In a 5-to-2 decision called Dombrowski v. Pfister, the Supreme Court ruled that the mere existence of the invalid laws tended to have a "chilling effect" on free expression. Abandoning an earlier policy in favor of abstention in such cases, the Court urged Federal judges to bar the enforcement of any such law before it is used to chill free speech.

One of the first judges to be reversed because of this change was Howard F. Corcoran of the Federal District Court in Washington.

He had denied a request by venders of allegedly obscene publications for an injunction to restrain the Government from enforcing an antipornography law. Citing the Dombrowski case, the Court of Appeals reversed him and ordered him to issue the injunction.

Thus, Judge Corcoran was receptive when A.C.L.U. lawyers argued that he should bar the enforcement of the Federal law that empowers the Un-American Activities Committee to investigate "the extent, character, and objects of un-American propaganda activities in the United States [and] the diffusion within the United States of subversive and un-American propaganda."

Relying on the Dombrowski decision and the more recent Court of Appeals decision, Judge Corcoran issued a temporary restraining order yesterday and convened a special three-judge District Court to decide if the ban on the committee's hearings should not be made permanent.

8-17-66
NYT

The Court of Appeals dissolved the restraining order today on the ground that threatened "irreparable injury" to the House witnesses was not proved. But the three-judge court must face the broader issue—whether to apply the Dombrowski rule to Congress—when it meets tomorrow.

The separation of powers among the executive, legislative and judicial branches has never been so distinct as the term implies. Court have frequently enjoined illegal actions by officials of the executive branch and have nullified laws passed by Congress.

But legal experts say the Federal judiciary has never before tried to intervene in Congress's conduct of its business, and for a sound reason—it would be biting the hand that pays it.

"The better part of wisdom would be for the three-judge court to decide either that it lacks power to enjoin a House committee, or that the law itself is constitutional," Prof. Philip B. Kurland, a constitutional law authority at the University of Chicago Law School, said today.

"In the event of a direct conflict between the Supreme Court and Congress, there is no doubt which has the strongest political position—Congress."

Professor Kurland pointed out that Congress appropriated the funds for the judicial branch and also had the power to reduce the Federal courts' jurisdiction to hear cases.

If it avoids a direct clash, the Federal judiciary will, of course, leave the committee free, if it wishes, to subpoena and question witnesses.

But the high court may not be without means to ward off a "chilling effect" on free speech.

In 1959 it upheld by a 5-to-4 vote the committee's power to require witnesses to answer questions about Communist activities.

The four dissenters — Chief Justice Earl Warren and Justices Hugo L. Black, William J. Brennan Jr. and William O. Douglas — are still on the Coutr. And two members of the majority — Justices Felix Frankfurter and Charles E. Whittaker—have been replaced.